U.S. Department of Labor

Office of Administrative Law Judges
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Date: February 29, 2000

Case No.: 1999-LHC-1532

OWCP No.: 08-112949

In the Matter of

GARY W. LAPOINT

Claimant

v.

TRINITY PLATZER SHIPYARD

Employer

and

RELIANCE NATIONAL INDEMNITY

Carrier

APPEARANCES:

ED W. BARTON, ESQ.
JOHN D. McELROY, ESQ.

For the Claimant

KARLA K. HAUSER, ESQ.

For the Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Gary W. Lapoint (Claimant) against Trinity Platzer Shipyard (Employer) and Reliance National Indemnity (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on September 14, 1999, in Beaumont, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 12 exhibits while Employer/Carrier proffered 13 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1 and JX-2), and I find:

1. That the Claimant was injured on April 14, 1997.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on April 14, 1997.

5. That an informal conference before the District Director was held on January 15, 1999.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; and Employer/Carrier Exhibits: EX-___; and Joint Exhibits: JX-___.

6. That Claimant received temporary total disability benefits from June 2, 1997 through October 4, 1998 at a compensation rate of $373.66 per week.

7. That Claimant's average weekly wage at the time of injury was $425.00.[2]

8. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

9. That Claimant reached maximum medical improvement on September 21, 1998 for his back injury.

II. ISSUES

The unresolved issues presented by the parties are:

1. Nature and extent of disability.

2. Suitable alternative employment.

3. Attorney's fees, interest and penalties.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant, who was born in Orange, Texas and is currently divorced, testified he has full custody of his 13½ year old son. (Tr. 17). After graduating from high school, Claimant served in the Navy and received welding training through the steel workers' training school. (Tr. 16). His welding certificate is, however, not current. Id. Claimant received an "other than honorable" discharge from the Navy due to a felony arson charge in 1981 to which he pled guilty. (Tr. 16-17). Since his discharge, Claimant has performed shipfitting, sandblasting, painting and welding work. (Tr. 20). He testified that due to his current back condition, he does not feel that he can return to his former employment as a sandblaster, painter or welder. (Tr. 21).

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[2] On December 2, 1999, both parties submitted a supplemental stipulation relating to Claimant's average weekly wage at the time of injury, which was marked and received into evidence by the undersigned as JX-2.

Prior to the April 14, 1997 accident, Claimant had sustained minor injuries, such as a hernia and muscle strains, from which he fully recovered. (Tr. 22). He testified these conditions were not affecting him or causing pain as of April 14, 1997. Additionally, these prior conditions do not bother him today. (Tr. 23).

At the time of his injury, Claimant was employed as a welder earning $11.50 per hour. (Tr. 23-24). He was classified as a first-class welder, which required him to work on top of, inside and under barges, in ballast tanks and perform overhead and horizontal welding. (Tr. 24). Claimant stated that he worked at Employer's facility about nine hours per day on week days and eight hours per day on Saturday, averaging about 52 or 53 hours per week, with 12 or 13 hours consisting of overtime. Id.

On April 14, 1997, Claimant was welding on a scaffold while working aboard a barge. (Tr. 25). He explained that in his preparation, he pulled some welding lead up to the barge with a cable, which was approximately 100-150 feet long, one-half inch in diameter and weighed more than 125 pounds. (Tr. 26). Claimant testified that the cable began to fall off the side of the barge and he grabbed it. He claimed the weight of the cable "jerked" his back. Id. Claimant did not immediately notice the injury, but began experiencing a burning sensation in his left hip when he picked up his ten-pound tool bucket. Id. At first, he thought he merely pulled a muscle so he continued to work for about one or two hours. (Tr. 27). Following completion of the job that day, he reported to his supervisor, Jerry Slone, that he "might have pulled a muscle in [his] lower back." (Tr. 27-28). Claimant was directed by Mr. Slone to report to the safety man, "Richard," who also thought Claimant had pulled a muscle. (Tr. 28). Richard applied some analgesic cream, gave Claimant some Motrin and told him to "take it easy [and] go back to work." Thereafter, Claimant continued to work until approximately 2:30 p.m. However, later that same day, Claimant told his foreman, Billy Landry, he was going to stop working that day due to the pain. Id.

Claimant testified that while at home, his condition did not improve. (Tr. 29). Although the accident occurred on a Monday morning, Claimant did not seek medical treatment until Friday morning. Id. On Tuesday, Claimant reported to work but quit at 11:30 a.m.; on Wednesday, Claimant did not work at all; on Thursday, he returned to a full work day because he needed the money. (Tr. 29-30). He reported again to the safety man on Friday, at which time, he was referred to Employer's physician, Dr. Howard Williams. (Tr. 30-31).

Claimant drove himself to Orange, Texas for his initial

appointment with Dr. Williams, who ordered x-rays and performed a physical examination. (Tr. 31). Claimant was told he had pulled some back muscles and was subsequently placed on light duty. His light duty tasks, to which no one was normally assigned, included sweeping and rolling up air hoses. Id. He returned approximately one week later to Dr. Williams, who instructed the safety man that Claimant could weld in a horizontal position while sitting, but could not engage in any reaching, climbing, twisting or bending. (Tr. 32). At that time, he was placed for work in the tool room. Claimant was aware of no welding positions which fit within the restrictions placed on him by Dr. Williams. (Tr. 32-33). Claimant further testified that Dr. Williams had prescribed some muscle relaxers, which he used at work, and ointment, which he used at home, for his back pain. (Tr. 33).

When he returned to work as a tool room pusher, Claimant performed "a little bit of everything" except for lifting heavy rods. Id. He worked as a tool pusher for approximately four to six weeks. (Tr. 34). Claimant testified that he continued to treat with Dr. Williams, but did not receive any other medications, physical therapy or any other type of medical treatment. Id. Because he did not feel like his condition was improving, Claimant sought treatment from another physician, Dr. Beaudry. Id.

Claimant first saw Dr. Beaudry on June 2, 1997, which was the last day Claimant worked for Employer. At that time, Dr. Beaudry gave Claimant a cortisone shot, a back brace, pain pills and muscle relaxers. (Tr. 35). Additionally, Claimant was restricted from work at this time. Dr. Beaudry also scheduled physical therapy sessions. Id. During the course of his treatment with Dr. Beaudry, Claimant underwent an MRI and received two epidural shots. Claimant currently wears his back brace whenever his back bothers him or he has to drive long distances. Id. He stated that Dr. Beaudry told him the MRI indicated a herniated disc. (Tr. 36). Claimant continued with physical therapy from June 1997 through September 1997. Id. In October, Claimant entered and completed a work-hardening program, but complained of pain the last few days of the program. (Tr. 36-37). Thereafter, Claimant underwent a CT scan, of which he did not know the results. (Tr. 37).

At the time of the hearing, Claimant continued to treat with Dr. Beaudry, who recommended he return for treatment approximately every three months. (Tr. 38). Dr. Beaudry told Claimant to not engage in activities which hurt or bothered him. Id. In January 1998, Claimant asked Dr. Beaudry to release him to return to full duty work with Employer. (Tr. 39). Claimant returned to Employer's facility and was directed to Dr. Williams for a physical examination and drug screening. Id. Claimant was not informed of

the results of the exam or drug test. (Tr. 40). After a few days passed, Claimant spoke with a woman, Pearl, at Employer's facility, who informed him that Employer had not determined whether he would be re-hired. Claimant was instructed to wait at home until Employer called him. Id. At the time of the hearing, Claimant had not yet heard back from Employer regarding his request to return to work. Id.

Claimant testified he tries to abide by Dr. Beaudry's restrictions with regard to his daily activities. (Tr. 41). He explained that he takes care of many household chores, like cooking and washing dishes. His son assists him with vacuuming, sweeping, cutting grass and carrying groceries. Id. Claimant is unable to play football or engage in other similar recreational activities with his son due to aggravation of his back pain. (Tr. 42).

Additionally, Claimant testified that he experiences constant pain in his lower back, as well as leg weakness. (Tr. 43). To alleviate the pain, Claimant uses a heating pad, takes hot showers and pain relievers and muscle relaxers every day. (Tr. 43-44). He stated that he did not have any problems with his lower back prior to April 1997. Id. Claimant testified that due to his condition, he can lift a maximum of 20-25 pounds. (Tr. 45). Moreover, the condition has caused him to suffer stress, limited his driving ability and affected his gait. Id. Claimant avoids bending and climbing since his injury. (Tr. 46). He notices weakness in his legs if he stands for periods of time longer than 15-20 minutes. (Tr. 47).

Furthermore, he claimed he attempted to find a job by applying for positions identified by Ms. Nancy Favoloro, Employer's vocational rehabilitation counselor. Id. His job search included applying for positions at the following places: Kinsel Auto Mall in September 1998; Patriot Security; Delta Security; Harmon Chevrolet in January 1999; Diamond Shamrock Gas Station in January 1999; Car Care Auto Parts in February 1999; Hi-Lo Auto Parts in February 1999; Auto Zone in April 1999; A-1 Transport; Gilbeaux's Towing; and Triangle Chevrolet. (Tr. 47-50). Claimant testified that he was never called for an interview nor hired by any of the potential employers. Id.

Claimant testified that he also applied with the Texas Workforce Commission in early 1999, but to date, has not received an offer from any employer through the Commission. (Tr. 50-51). He claimed that he recently checked for job availability at Reliable Cleaners and Triangle Chevrolet and submitted an employment application to Conn's Appliances. (Tr. 51). Claimant testified he has not received calls back from these potential

employers. Id. He stated that the only job leads he received were for construction welding positions. (Tr. 52). Claimant received a postcard from Brown & Root which had a welding position available in September 1999. Id. Claimant averred that he cannot return to work as a welder due to his physical condition. Id. He explained that he did not apply for any positions in Lake Charles, which is approximately 50 miles from his home. (Tr. 52-53). He testified that his current compensation rate is $472.48 per week. (Tr. 53). In addition to a felony arson conviction, Claimant has been convicted of one felony DWI and two or three additional misdemeanor DWIs. Id.

On cross-examination, Claimant testified that as a shipfitter for Employer, his duties included replacing rusted metal and steel on barges. (Tr. 55). Additionally, he performed welding for Employer. Id. He re-affirmed that he earned $11.50 per hour after he began working for Employer on the night shift, but that his wages were reduced by 50 cents when he started working the day shift. (Tr. 56). While working in the tool room, his duties included dispensing tools and other equipment and repair work on welding machines. (Tr. 57-58). He testified that he alternated sitting, standing and walking while in the tool room. (Tr. 58). Originally, Claimant worked similar hours to those he worked prior to the injury, but after a couple weeks, Employer reduced him to 40 hours per week. (Tr. 58-59).

Claimant chose Dr. Beaudry as his treating physician and has been satisfied with the medical treatment rendered. (Tr. 60). He claims that he is honest with Dr. Beaudry and takes all medication which has been prescribed to him. Id. Additionally, he continues to wear the back brace issued to him by Dr. Beaudry. Id. Claimant agreed with Dr. Beaudry that he could perform light duty work. (Tr. 61).

Claimant discovered through a newspaper advertisement that Harmon Chevrolet was hiring. Id. He claimed that he applied for a delivery driver position in person, but was informed Harmon was not hiring for that position. Id. Claimant learned about the Diamond Shamrock gas station position by asking in person whether any positions were available, to which he was told “no.” (Tr. 62). Claimant asked in person for job availability of delivery driver positions at Car Care, but was told that they only needed counter salesmen. Id. At Hi-Lo Auto Parts and Auto Zone, Claimant again asked in person about job availability, but was told there were no openings. Id. Claimant called Gilbeaux’s Towing, A-1 Transport and Reliable Cleaners to inquire about job availability, but was told there were no delivery driver positions available. (Tr. 63). He also called Triangle Chevrolet, but was informed there were no

openings. (Tr. 64). The week prior to the hearing, Claimant applied at Conn's Appliances. (Tr. 65).

In 1998, Claimant received job lists from Ms. Favoloro. (Tr. 66). He testified that he did not apply for the Sears job because Dr. Beaudry said it was inappropriate. Id. Claimant never contacted Sears to inquire about the physical duties required and did not know if Dr. Beaudry did so. Id. He did not apply for the Centennial Wireless and Circuit City positions because he had not been to Beaumont, which is where the positions are located. (Tr. 66-67). Claimant testified he has not received any job listings from Mr. William Kramberg, Claimant's vocational expert. (Tr. 68).

On redirect examination, Claimant testified that had he not been injured, he would have continued to work as a welder for Employer. Id. He explained that while working in the tool room, he did not have to lift the 50 pound bundles of welding rods, as heavy lifting was performed by other employees. (Tr. 69). Claimant testified that he does not know if he can perform light duty work, but is "willing to try." (Tr. 70). He stated that he sometimes needs to lay down due to his back pain, but does not know of a job position where an employee can lay down during the day. (Tr. 71). Finally, Claimant testified he has never held any type of sales position, automobile service advisor position or security guard position. Id.

Medical Evidence

Howard C. Williams, M.D.

Claimant presented to Dr. Williams on April 18, 1997 with complaints of back pain. (EX-7, p. 1). Dr. Williams diagnosed a lumbar muscle strain and prescribed medication. Id. He released Claimant to light duty work at that time. Id.

Claimant returned on April 25, 1997, at which time, Dr. Williams noted slight improvement in his condition. Id. He issued another light duty release to Claimant. Dr. Williams examined Claimant every week in May 1997 and noted his condition was improving. Claimant did not seek further medical treatment from Dr. Williams after May 23, 1997. Id. Dr. Williams did not assign an impairment rating to Claimant. Id.

Carl Beaudry, M.D.

Dr. Beaudry, who is board-certified in orthopaedic surgery, was deposed by the parties on August 12, 1999 in Port Arthur, Texas. (CX-3). Dr. Beaudry first examined Claimant on June 2,

1997, at which time, he presented with lower back pain and radiating pain in his left leg, which Claimant attributed to pulling on a welding cable. (CX-3, p. 7). Claimant described the medical treatment he had received up to that time for this injury. Id. Upon physical examination, Dr. Beaudry initially diagnosed Claimant with an acute lumbosacral sprain. (CX-3, p. 9). He testified that Claimant's injury was consistent with the history provided to him. Id. Dr. Beaudry subsequently recommended an MRI be performed on June 10, 1997, which revealed a small central disc herniation and slight dessication at the L5-S1 level. (CX-3, pp. 9-10; CX-4, p. 38). Dr. Beaudry recommended conservative treatment, prescribed analgesic, anti-inflammatory and anti-spasmodic medication and gave Claimant a back brace and an epidural injection. (CX-3, p. 10). He further opined that after Claimant was injured on April 14, 1997, he "could not have carried out his regular duties as a welder." (CX-3, p. 11).

Claimant returned for treatment on June 16, 1997, at which time, Dr. Beaudry recommended continued conservative treatment and gave Claimant an epidural block, which helped to diminish his pain. (CX-3, p. 12). When Claimant returned on July 3, 1997, he reported that although he was less symptomatic than he was at the time of the original injury, his condition had not improved much since the epidural. (CX-3, pp. 12-13). Claimant continued to receive epidural injections over a period of six weeks, but because his condition did not improve, Dr. Beaudry recommended a CT scan of the lumbosacral spine. (CX-3, p. 13).

Claimant continued to treat with Dr. Beaudry through 1997. Additionally, he continued the physical therapy program. As of October 14, 1997, Dr. Beaudry noted Claimant remained temporarily and totally disabled and opined he could not return to his regular duties as a welder. (CX-4, p. 30).

On December 1, 1997, Dr. Beaudry noted some improvement in Claimant's condition. (EX-1, p. 11). He further noted Claimant had not yet reached maximum medical improvement, but rather, remained temporarily and totally disabled. Id. With respect to a light duty program, Dr. Beaudry stated he "would have to review various job descriptions available before making any decision." Id.

Claimant returned for treatment on January 6, 1998, at which time Dr. Beaudry released him to return to his regular welding duties effective January 12, 1998, despite his continued symptoms. (CX-4, p. 25; CX-3, p. 18). Dr. Beaudry re-evaluated Claimant on April 14, 1998, at which time Claimant advised him that he had not yet returned to work due to continuing pain. Dr. Beaudry stated

Claimant's status remained temporarily and totally disabled. (CX-4, p. 24).

Dr. Beaudry noted no significant changes in Claimant's condition on the following occasions: May 12, 1998; June 23, 1998; July 20, 1998; and August 4, 1998. (CX-4, pp. 14-23). On August 4, 1998, Dr. Beaudry recommended Claimant undergo a functional capacity evaluation.[3] (CX-4, p. 14). At this time, Claimant remained temporarily and totally disabled. Id.

Claimant was seen again on September 9, 1998, at which time Dr. Beaudry reviewed several job descriptions and approved the following positions as suitable for Claimant: central station monitor; security guard; service advisor; and weigh station monitor. (CX-4, p. 11). He opined the retail sales position was inappropriate. (CX-3, pp. 23-24). He explained that Dr. Haig approved the same positions he approved as suitable for Claimant. Id. Dr. Beaudry's approval was based upon Claimant's neuro-orthopaedic condition rather than his intellectual capacity or aptitude. (CX-3, p. 25). Dr. Beaudry testified that he agreed with Dr. Haig's assessment concluding Claimant reached maximum medical improvement on September 21, 1998 and had a 9% whole body impairment rating. (CX-4, p. 11). No significant changes were noted on December 10, 1998, March 16, 1999 and June 18, 1999. (CX-4, pp. 1-3). Through Claimant's June 18, 1999 visit, his condition remained substantially unchanged, despite conservative treatment and a work hardening program in which he was involved. (CX-3, pp. 16-17).

In August 1999, an EMG was performed, which revealed a negative neurological evaluation. Claimant continued to report chronic lower back pain. (CX-3, p. 14). At that time, Claimant was continued on medication and physiotherapy. Id. Dr. Beaudry agreed with the opinion of Dr. Sacks, a physiatrist who performed the EMG and noted that Claimant's injury "likely induced a minor disc injury but with significant myofascial strain." Id. Currently, Claimant complains of chronic lower back pain radiating into his left leg and occasionally into his right leg, depending upon the activities in which he engages. (CX-3, p. 17). Dr.

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[3] The functional capacity evaluation was conducted by Gwendolyn Ano, a physical therapist, who noted Claimant did not exert himself to maximum capability. The therapist further noted that in order to determine and make a valid return-to-work statement, Claimant must be willing to perform to his maximum capabilities. (CX-4, p. 10). Finally, she recommended Claimant attend a pain clinic program to establish an effective coping mechanism. Id.

Beaudry agreed with Dr. Haig, who evaluated Claimant on February 26, 1998, that Claimant would not be able to lift over 25 pounds. (CX-3, pp. 20-21).

In his April 17, 1998 report, Dr. Beaudry opined Claimant's condition was permanent and would require continuing medical treatment, including therapy and future epidural blocks. (CX-3, pp. 21-22). He testified Claimant has been very compliant with his recommendations and medical treatment. (CX-3, p. 26). While the functional capacity evaluator noted Claimant was "self-limiting," Dr. Beaudry explained that this observation was appropriate as Claimant had exacerbated his pain while in the work hardening and physical therapy programs. (CX-3, p. 27). Claimant is currently taking Vicodin and Skelaxin and there has been no indication that Claimant is abusing such medication. (CX-3, p. 28). Due to the medication Claimant is taking, Dr. Beaudry advised him to not drive or handle heavy equipment, particularly where it might pose a threat of harm to Claimant or others. Id. Dr. Beaudry further discouraged taking such medication even while working a light duty job because "it could lead to mistakes." (CX-3, p. 29).

Dr. Beaudry testified that no physician has opined Claimant requires surgical intervention for his condition. Id. Since Claimant continued to experience pain as of June 18, 1999, Dr. Beaudry recommended a repeat MRI to determine the progression of the herniated disc. (CX-3, p. 30; CX-4, p. 1). He further opined that Claimant is capable of light duty work and placed the following restrictions: lifting limits of 20 pounds infrequently and 10 pounds frequently and alternate standing and walking for six hours of an eight hour day and sitting for two hours. (CX-3, pp. 30-31). Dr. Beaudry discouraged Claimant from repetitive bending. (CX-3, p. 32).

On cross-examination, Dr. Beaudry opined that Claimant suffered no residual neurological or gross motor deficits. (CX-3, pp. 33-34). He further explained that the herniated disc was not causing enough pressure on Claimant's nerves to result in neurological deficit. (CX-3, p. 34). He also opined that Claimant's level of myofascial strain was "severe Grade 2." (CX-3, p. 35). Dr. Beaudry does not believe Claimant has recovered from the strain and classified it as a "chronic sprain...with long-standing potential for symptoms of pain and instability." Id.

Dr. Beaudry stated that, except for a repeat MRI, no further diagnostic tests or physical therapy have been recommended for or performed on Claimant. (CX-3, p. 37). He testified that when he released Claimant to return to work in January 1998, he believed Claimant could perform light duty at that time. Id.

With respect to Dr. Ford's findings that Claimant could not return to his regular duties, Dr. Beaudry agreed. (CX-3, p. 38). However, he disagreed with Dr. Ford's opinion that Claimant could return to his former employment following a work hardening program. Id.

Dr. Beaudry was presented with an additional labor market survey which was performed by Ms. Favoloro in August 1999. (CX-3, p. 44). After reviewing it, he determined that the meter reader position was inappropriate due to the physical requirements. (CX-3, p. 46). He opined that the sales associate job would be appropriate if the physical duties were strictly followed. (CX-3, p. 48). With respect to the retail sales, sales/customer service and production worker positions, Dr. Beaudry stated that these would not be appropriate if Claimant was required to lift 20 pounds or more repetitively. (CX-3, p. 49). However, if the lifting restrictions fall within Claimant's capabilities and are strictly met, those positions would be appropriate. Id. Finally, Dr. Beaudry opined Claimant can return to work in an environment where he will not risk re-injury to his back. Id.

On re-cross examination, Dr. Beaudry opined Claimant should seek part-time employment initially "to see how things work out." (CX-3, p. 50). He also stated that Claimant will "undoubtedly" have periods in the future where his condition will cause him to be temporarily and totally disabled from any occupation. Id.

Steven M. Sacks, M.D.

Dr. Sacks, a physical medicine and rehabilitation physician, examined Claimant on October 2, 1997. (EX-4). The record does not establish at whose request Claimant saw Dr. Sacks. Upon examination, Dr. Sacks opined Claimant sustained a minor disc injury with significant myofascial strain. (EX-4, p. 4). Additionally, he noted that a ligamentous strain was possible, as was a lower or mid-lumbar level strain. Id. At that time, he recommended an EMG to confirm "any level of peripheral or central injury" which would be inducing Claimant's chronic symptoms. Id. The EMG studies resulted normally. (EX-4, pp. 5-7).

Thomas B. Ford, M.D.

Dr. Ford, a board-certified orthopaedic surgeon, performed an examination at the behest of Employer/Carrier upon Claimant on December 22, 1997. (EX-3). At that time, Claimant complained of general back soreness. (EX-3, p. 2). Upon physical examination, Dr. Ford diagnosed a lumbar strain. (EX-3, p. 3). He did not find any evidence of nerve root impingement or disc herniation. Id.

Dr. Ford recommended Claimant be placed on a work hardening program for four to six weeks and thereafter "should be able to return to his pre-injury activity level." Id.

Martin R. Haig, M.D.

Dr. Haig, a board-certified orthopaedic surgeon, first examined Claimant on February 25, 1998, based on the referral by Dr. Beaudry. (EX-2, p. 4). After physical examination, Dr. Haig opined that Claimant cannot lift more than 25 pounds and recommended re-training in another occupation. Id. He noted, however, that Claimant was not totally disabled and was capable of light duty. Id.

Claimant returned to Dr. Haig on September 22, 1998, at which time, he underwent range of motion tests. Dr. Haig assigned a 9% whole body impairment rating to Claimant. (EX-2, p. 1).

Vocational Evidence

Nancy Favoloro

Ms. Favoloro, a certified vocational rehabilitation counselor, was hired at the behest of Employer/Carrier to provide an employment assessment of Claimant. (Tr. 74). She first met Claimant on June 25, 1998, at which time, she gathered background information, administered tests and prepared an initial report. Id. Ms. Favoloro testified that when she interviewed Claimant, he did not report that he had a felony conviction, but did report that he received an "other than honorable" discharge from the military. (Tr. 75). Additionally, she reviewed the medical reports of Drs. Beaudry, Ford, Sacks and Haig, physical therapy reports and the functional capacity evaluation. Id. Based upon a review of the records, Ms. Favoloro opined Claimant can perform light duty work. Id.

With respect to the tests administered, Ms. Favoloro testified that Claimant scored an 11th grade equivalency on the reading comprehension test; a 7th grade equivalency on the math test; and between an 11th and 12th grade equivalency on the applied problems test. (Tr. 77). She testified the Department of Labor provides that driving 45 miles to a job is appropriate.[4] She also testified that Lake Charles and Beaumont are 36 miles and 23 miles, respectively, from Orange, Texas. (Tr. 78).

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[4] It should be noted Ms. Favoloro provided no support for this statement.

During the first labor market survey conducted in July and August 1998, Ms. Favoloro found six positions.

The weigh station monitor offered training and was classified as sedentary, with the ability to alternate sitting and standing during the work day. (EX-8, pp. 8-9). Ms. Favoloro stated this position involved completion of paperwork and may involve infrequently climbing five steps "to complete a measurement." Id. The wage rate is $1,194.00 per month. Id.

The central station monitor with Sonitrol Security Systems also provided training and was classified as sedentary. (EX-8, p. 9). Duties include answering the phone and completing paperwork. Id. No lifting was required and the position paid minimum wage. Id.

The retail sales position with Sears provided training and the duties involved assisting customers with merchandise selection, alternate standing and walking. Id. Additionally, Ms. Favoloro stated that sales clerks are not required to lift objects, but if they choose to do so, lifting requirements do not exceed 20 pounds. (Tr. 79). Employees are allowed to sit regularly during scheduled breaks (15 minutes per every four hours worked) and lunch periods (one hour after working five or more hours per day). Wages are $7.00 to $9.00 per hour. (EX-8, p. 9). Ms. Favoloro testified no high school diploma was required and that Claimant's felony conviction would not affect his ability to obtain the Sears position. (Tr. 80).

Two security guard positions with Patriot Security and American Citadel Group were located but required "someone with a clean police record." Duties involved alternate sitting, standing and walking and no heavy lifting was required. (EX-8, p. 9). Hourly wages are $5.15 and $6.25, respectively. Id. She testified that although these positions were physically appropriate, they would not be suitable for Claimant due to his felony conviction. (Tr. 86).

Finally, the service advisor position with Kinsel Auto Mall offered training and paid $2,000 to $3,000 per month. Id. Ms. Favoloro testified that basic math skills are preferred. (Tr. 81). The physical duties involved alternate sitting, standing and walking, with no lifting requirements since the job is essentially "a paperwork type of position." Id. She testified no high school diploma was required and that Claimant's felony conviction would not affect his ability to obtain the service advisor position. Id.

In response to the undersigned's questioning, Ms. Favoloro

testified that she specifically asked the above potential employers whether Claimant's particular felony conviction would affect his ability to obtain a job. (Tr. 82). She stated she first learned of Claimant's felony conviction after reading Mr. Kramberg's deposition and report. Id.

The October 27, 1998 labor market survey identified the following positions: retail sales at Sears; security guard at Patriot Security; security guard at Delta Security; sales at Centennial Wireless; sales at Circuit City; and sales at Conn's Appliances. (EX-8, p. 4). The first three identified positions involved the same duties as noted hereinabove.

The sales position at Centennial Wireless, which provided training, involved handling paperwork. Additionally, the lifting requirements did not exceed 20 pounds, as the only objects to be lifted were cell phones, beepers and phone batteries. (Tr. 82-83). The position paid minimum hourly wage plus commission. (Tr. 83). Centennial Wireless informed Ms. Favoloro that Claimant's felony conviction would not affect his employability. (Tr. 84).

The sales position at Circuit City, which did not require employees to lift more than 20 pounds, provided training and pays $7.25 per hour or on the basis of commission, whichever is greater. Employees can choose to work four, six or eight hour shifts between 10:00 a.m. and 9:00 p.m. Id. Ms. Favoloro inquired whether Claimant's conviction would affect his ability to obtain this position and was informed it would not affect him. (EX-8, p. 2; Tr. 85).

Ms. Favoloro also identified an appliance sales position at Conn's Appliances, which also provided training. Id. Physical requirements involved alternate sitting, standing and walking and no lifting above 20 pounds. Id. The monthly wage earning ability was estimated at $1,750.00 plus commission. (Tr. 86). Ms. Favoloro asked Conn's if the conviction would affect Claimant's ability to obtain the sales position and was informed that it would not affect him. Id.

In August 1999, Ms. Favoloro identified additional positions. She found a meter reader position with PPM which involved walking from house to house reading meters for electricity usage and using a 10-pound handheld computer. (Tr. 89). The physical requirements included walking and occasional bending. Wages are $7.00 per hour during training; $9.00 per hour for the first three months of employment; and $10.00 per hour thereafter. (Tr. 90). Additionally, a high school diploma or GED is required. (EX-8, p. 1).

The sales position at Sears and sales position at Circuit City were re-included in the August 4, 1999 labor market survey based on their availability. (EX-8, p. 2). Two additional positions were located: a door sales position and a lab technician. Id. The door-to-door sales position with K. B. Blake Imports was classified as sedentary and paid $300-$400 per week. (EX-8, p. 2). The physical requirements included alternate sitting, standing and walking, the ability to get in and out of a car and the maximum lifting requirement was 20 pounds. Id. No experience is necessary and job training is provided. (EX-8, p. 2).

The lab technician position at Helena Laboratories paid $6.65 per hour and provided training. (EX-8, p. 2; Tr. 90). Lifting requirements did not exceed 20 pounds and Ms. Favoloro classified this position as sedentary. Id. A high school degree is required. (EX-8, p. 2). With respect to the door salesperson and lab technician positions, Ms. Favoloro asked the potential employers whether Claimant's felony conviction would affect his employability and was informed that it would not affect him. (Tr. 91).

On cross-examination, Ms. Favoloro testified that she usually provides identified employment opportunities to a claimant about two weeks after she has initiated her search. (Tr. 93). She stated that while she compiled a list of potential employers and mailed the results of her search to Employer/Carrier on August 17, 1998, she sent the job opportunities to Claimant on August 21, 1998. (Tr. 94). Additionally, Ms. Favoloro stated that on two occasions prior to the August 4, 1999 labor market survey, she called the potential employers and was informed Claimant had not applied for any of the jobs identified. Id. Ms. Favoloro opined Claimant was not interested in her services. (Tr. 95).

When Ms. Favoloro initially met with Claimant, she attempted to obtain all relevant and important information in order to provide an employability assessment. (Tr. 97). She explained that she uses a form to obtain all information and that one of the questions on the form inquires about criminal history. (Tr. 98). She further explained that Claimant's form is blank in the criminal history section "which generally means [claimants] indicated they didn't have any convictions." Id. Ms. Favoloro has no independent recollection that Claimant actually stated that he had no criminal convictions. Id. She testified that she discussed Claimant's military discharge with him, but "didn't think to ask him, was that a felony?" Id. She acknowledged that Claimant's discharge status might affect his employability and prompt potential employers to inquire about it. (Tr. 99). Ms. Favoloro has never seen Claimant's answers to interrogatories, in which his conviction is specifically identified. (Tr. 100). She explained that she

normally does not rely on Employer's information and exhibits, but rather, relies on the interview of the injured worker and medical evidence in order to form her assessment. Id.

Ms. Favoloro opined Claimant could not return to his former job as a welder. (Tr. 101). She opined that a claimant's labor market, in terms of travel distance which may be required, does not change between minimum wage workers and employees earning $60,000 per year. (Tr. 104).

With respect to the August 1998 labor market survey, Ms. Favoloro testified that one of her employees, Kerry Wiltz, contacted the potential employers between July 17 and July 20, 1998. (Tr. 105-106). She stated that Ms. Wiltz checked back with those potential employers on September 3, 1998, but was informed Claimant had not applied for any of the positions. (Tr. 106). Ms. Favoloro eliminated the central station monitor position based on Claimant's felony conviction. Id. Additionally, she did not think Claimant had any sales experience. (Tr. 107). She was aware that Dr. Beaudry did not think the Sears position was appropriate because he was misinformed about the lifting requirements. Id. She was not aware that the Kinsel Auto Mall service advisor position required typing skills of 30 words per minute. Id. She also stated that Conn's would consider him for the sales position despite his felony conviction. (Tr. 108).

With respect to the October 27, 1998 labor market survey, Ms. Favoloro testified that the Centennial Wireless position would prefer sales experience, but would nevertheless provide training for an employee with no sales experience. (Tr. 109-110). She was aware that Circuit City performed background checks on all potential employees. She also stated that in addition to four, six and eight hour shifts, the Circuit City position has ten-hour shifts available but that "very few people work them." Id.

Ms. Favoloro admitted that the August 4, 1999 labor market survey does not specify the names of potential employers. (Tr. 111). She testified that she asked PPM whether Claimant would be considered for the meter reader position despite his felony conviction and was informed that Claimant would be considered. (Tr. 112). She further testified the position at Helena Labs was considered sedentary and that when that employer was called in July 1999, Ms. Favoloro was told they were accepting applications and expecting to hire. (Tr. 114). She was not aware that Helena Labs had not hired employees since May 1999, when a strike was completed. Id. She re-affirmed that Claimant would be considered for employment with Helena Labs despite his criminal conviction. Id. Finally, she testified that she relied on her employee, Ms.

Wiltz, to provide accurate information about the potential jobs in order to perform the labor market survey. (Tr. 115).

On re-direct examination, Ms. Favoloro testified Ms. Wiltz is licensed as a rehabilitation counselor under supervision. (Tr. 115). Ms. Favoloro had no reason to believe the information provided to her by Ms. Wiltz was inaccurate. (Tr. 116).

William J. Kramberg

Mr. Kramberg, a licensed professional counselor and certified rehabilitation counselor, was retained by Claimant to perform a vocational assessment of Claimant and rebut Ms. Favoloro's labor market survey "in an effort to render opinions regarding Claimant's employability." (Tr. 120-121). He testified that he interviewed Claimant, took his history, reviewed medical records, performed vocational tests and made employer contacts. (Tr. 121). Based upon the foregoing, Mr. Kramberg opined Claimant is not able to return to his former employment as a welder. Id. He further opined that the job positions identified by Ms. Favoloro are "[in]consistent with the facts of this case...[and] are inappropriate." (Tr. 122). Mr. Kramberg believed the jobs identified were inappropriate primarily because of Claimant's criminal history. Id.

Upon review of Ms. Favoloro's August 17, 1998 labor market survey, Mr. Kramberg stated that weigh station monitor and central station monitor were withdrawn by Ms. Favoloro due to Claimant's criminal conviction. Id. With respect to the sales position at Sears, Mr. Kramberg testified the lifting requirements exceed Claimant's capabilities, as he was informed the position required lifting up to 50 pounds. (Tr. 123). He stated the security guard positions were also withdrawn from consideration by Ms. Favoloro due to Claimant's criminal background. Id.

Mr. Kramberg concluded the service advisor position at Kinsel Auto Mall was inappropriate because the standing and walking requirements exceeded the restriction placed on Claimant by Dr. Beaudry that he could not stand more than six hours in an eight-hour work day. (Tr. 124). Additionally, he opined that Claimant's lack of sales experience would make this position inappropriate. Id.

Mr. Kramberg also reviewed the October 27, 1998 survey. He found the Sears position inappropriate for the same reasons as stated above, i.e., excessive lifting requirements. (Tr. 126). He also concluded the sales position at Centennial Wireless was inappropriate because Claimant has no sales experience. (Tr. 127).

Mr. Kramberg opined that Claimant possesses no transferable skills whatsoever in the area of sales. (Tr. 128). Likewise, Mr. Kramberg testified the positions at Circuit City and Conn's Appliances are inappropriate because Claimant has no sales experience, may not pass the background check and may be required to walk and stand more hours than his physical restrictions allow. (Tr. 129-130).

Mr. Kramberg also reviewed the August 4, 1999 labor market survey and concluded the meter reader position was inappropriate because the walking requirements may exceed Claimant's capabilities and he may not pass the background check, particularly with his driving history. (Tr. 132). The Circuit City and Sears positions are inappropriate for the same reasons as explicated hereinabove. (Tr. 133). Mr. Kramberg believed the position at K.B. Blake Imports was inappropriate due to "the tenuous pay," "the amount of walking that would be involved," and "the ability to deal with the public." (Tr. 134). Furthermore, he opined the lab technician position at Helena Labs was inappropriate because Claimant would not pass a driver's license check and the duties exceeded his physical capabilities. (Tr. 135). He opined Claimant has no transferable skills with respect to the positions identified in the August 4, 1999 survey. Id.

On cross-examination, Mr. Kramberg admitted that he found no suitable jobs for Claimant. (Tr. 137). With respect to the Sears and Circuit City positions, for which potential employees undergo a pre-employment test (PSE), Mr. Kramberg was not familiar with the content of the test. He stated that although Claimant may pass the PSE, it would be "an additional hurdle." (Tr. 139-140). He asked Sears and Circuit City whether they perform background checks, but did not specifically ask about Claimant's felony history and how that might affect his employability with these companies. Id.

Mr. Kramberg admitted that he did not learn the specific number of hours each day that Claimant would be standing and walking while at Kinsel Auto Mall. Id. He also admitted that he did not ask the potential employers whether individuals can work less than the hours per week required at Conn's and Circuit City. (Tr. 143). Mr. Kramberg also did not ask whether the meter reader position has shifts available that are less than eight hours per day. (Tr. 144). With respect to the meter reader position, Mr. Kramberg did not ask whether Claimant's DWI convictions would preclude Claimant from being hired. (Tr. 145-146). Additionally, he admitted that out of every potential employer he contacted, except for the security guard positions, he did not ask whether those employers would be willing to consider hiring an employee with Claimant's criminal background. (Tr. 146).

Mr. Kramberg opined that the record does not provide any evidence of Claimant's wage earning capacity. (Tr. 147). He further opined at the time of the hearing that Claimant was not employable. (Tr. 148). Finally, he admitted that he had not performed any independent research to determine if any other suitable alternative jobs existed. (Tr. 149)

The Contentions of the Parties

Claimant argues that he was temporarily and totally disabled from June 2, 1997[5] to September 21, 1998 and permanently and totally disabled from September 22, 1998 through present, based upon Claimant's average weekly wage of $425.00. It is further contended that Employer/Carrier failed to establish suitable alternative employment and that Claimant's prior criminal record precludes him from obtaining any alternate employment. Finally, Claimant alternately avers that if Employer/Carrier is found to have established suitable alternative employment, he has exerted reasonable diligence in seeking employment, but has nevertheless been unsuccessful and is therefore entitled to permanent total disability compensation benefits.

Employer/Carrier, on the other hand, contend that suitable alternative employment was established. Furthermore, it is argued that Claimant's prior criminal record does not prohibit him from obtaining employment and thus entitles him to only permanent partial disability compensation benefits. Finally, Employer/Carrier maintain Claimant has not been diligent or reasonable in his attempts to return to work and therefore Claimant is precluded from permanent total disability compensation benefits.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. V. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d

[5] In brief, Claimant's counsel contends June 2, 1997 is the beginning of the temporary and total disability period, even though the date of injury was April 14, 1997.

730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F. 2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury which occurred on April 14, 1997 when he pulled a 125-pound cable during the course and scope of his employment. However, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v.

Director, OWCP, supra., at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F. 2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, ftn 5. (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The parties stipulated that Claimant reached maximum medical improvement with respect to his back condition on September 21, 1998. The medical records of Drs. Beaudry and Haig support this stipulation and therefore, I find that Claimant reached maximum medical improvement on September 21, 1998.

Additionally, it should be noted that Claimant performed modified light duty work in the tool room as a "pusher" earning his regular salary for approximately four to six weeks following his injury. (Tr. 34). His condition did not improve during this period and he sought additional medical treatment from another physician, Dr. Beaudry. Id. Claimant began treating with Dr. Beaudry on June 2, 1997, at which time, he opined Claimant was temporarily and totally disabled from his position as a welder and that after the April 14, 1997 injury, he "could not have carried out his regular duties." (CX-3, p. 11). By continuing to engage in gainful employment, albeit modified light duty, and receive salary from the date of his injury through May 1997, Claimant was not temporarily totally disabled until Dr. Beaudry opined so on June 2, 1997, and advised Claimant to discontinue working.

In light of the foregoing, I find that Claimant was temporarily and totally disabled from June 2, 1997, the date Dr. Beaudry opined that he could not return to work, through September 21, 1998, the date he reached maximum medical improvement with respect to his back condition. Thus, Claimant is entitled to temporary total disability compensation benefits from June 2, 1997 through September 21, 1998 based on his average weekly wage of $425.00.

It should be noted that Drs. Beaudry and Haig opined Claimant could not return to his former employment as a welder, but could return to lighter duty work within certain physical restrictions. Given each physician's qualifications as board-certified orthopaedic surgeons and the time spent evaluating and examining Claimant, I find their medical opinions well-reasoned and persuasive in establishing Claimant cannot return to his former employment. Thus, because Claimant was restricted from returning to his former work, he has established a case of total disability. Consequently, when Claimant reached maximum medical improvement, his condition became permanent and total, which entitles him to permanent total disability compensation benefits from September 22, 1998 through October 27, 1998, the date suitable alternative employment was established by Ms. Favoloro, as more fully explicated hereinbelow.

Thereafter, suitable alternative employment having been established causes Claimant's disability status to become permanent partial. Thus, he is entitled to permanent partial disability compensation benefits from October 28, 1998 and continuing through present based on the difference between his average weekly wage and his post-injury wage earning capacity.

C. Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F. 2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F. 2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F. 2d 1039 (5th Cir. 1992). However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane, 930 F. 2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F. 2d at 1042-1043; P & M Crane, 930 F. 2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

Additionally, evidence of specific job openings available at any time during the critical periods when the claimant is medically able to seek work is sufficient to establish the availability of suitable alternative employment. See Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540 (4th Cir. 1988); Bryant v. Carolina Shipping Co., 25 BRBS 294 (1992).

In the present matter, based on the record evidence, I find that Employer/Carrier established suitable alternative employment on August 17, 1998.

Employer/Carrier rely upon the testimony and labor market surveys conducted by Ms. Favoloro as supportive of the existence and establishment of suitable alternative employment.

The first labor market survey was performed in July and August 1998 and the results were set forth in a report dated August 17, 1998. Ms. Favoloro identified in the Beaumont and Lake Charles areas six positions which she opined were within Claimant's skills and abilities and the restrictions outlined by Dr. Haig:[6] central station monitor, weigh station monitor; two separate security guard positions; sales position at Sears; and service advisor at Kinsel Auto Mall. (EX-8, p. 8).

The central station and weigh station monitor positions, as well as the security guard positions, were withdrawn by Ms. Favoloro due to Claimant's criminal background. Based on the foregoing, I find and conclude the central station monitor, weigh station monitor and two security guard positions do not constitute suitable alternative employment.

The retail sales position at Sears required no previous sales experience and would provide training. The duties involved assisting customers with merchandise selection and maximum lifting requirements did not exceed 20 pounds. Employees are allowed to sit during breaks and lunch periods. The wage rate for this position is $7.00 to $9.00 per hour. (EX-8, p. 9; Tr. 80). Mr. Kramberg testified employees may be required to lift up to 50 pounds and concluded this position was beyond Claimant's capabilities. (Tr. 123). Additionally, Dr. Beaudry did not approve this position. (CX-3, pp. 23-24). Finally, Claimant would be allowed to sit for 15 minutes per every four hours worked and

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[6] Dr. Haig approved each of the six positions as suitable within Claimant's physical and functional capabilities. It should be noted that at the time the survey report was written, Ms. Favoloro had not received approval of the job positions found in July and August 1998 from Dr. Beaudry.

during lunch. This requirement clearly exceeds the restrictions placed on him by Dr. Beaudry, who stated that Claimant would need to alternate standing and walking for six hours and sitting for two hours of an eight hour work day. (CX-3, pp. 30-31). Thus, due to these requirements exceeding Claimant's physical capacities, the discrepancies in physical requirements as determined by Ms. Favoloro and Mr. Kramberg and because Dr. Beaudry, whose opinions I find to be well-reasoned and persuasive, failed to approve the position, I find this position, which does not permit sitting during work hours, does not constitute suitable alternate employment.

The service advisor position at Kinsel Auto Mall provided job training and paid $2,000 to $3,000 per month. The physical requirements included alternate sitting, standing and walking, with no lifting requirements, as the job is essentially "paperwork." (Tr. 81). Claimant's employability would not be affected by his felony convictions. Id. Based on the foregoing information, I find this position falls within Claimant's physical and functional capabilities and therefore constitutes suitable alternative employment.

The second labor market assessment of October 27, 1998 established the following positions: retail sales at Sears in Beaumont, Texas; security guard at Patriot Security in Nederland, Texas; security guard at Delta Security in Port Arthur, Texas; sales at Centennial Wireless in Beaumont, Texas; sales at Circuit City in Beaumont, Texas; and sales at Conn's Appliances in Beaumont, Texas. (EX-8, p. 4). I will determine the suitability of the positions identified in the second labor market survey for purposes of determining Claimant's post-injury wage earning capacity.

The sales position at Sears was re-included in this labor market survey. For the same reasons noted hereinabove, I find this position does not constitute suitable alternate employment.

The two security guard positions were eliminated by Ms. Favoloro from consideration due to the fact that applicants must have "a clean police record." For the same reasons explicated hereinabove, I find that the security guard positions do not constitute suitable alternate employment.

The sales position at Centennial Wireless provided training and involved handling paperwork. Lifting requirements did not exceed 20 pounds, as the only objects to be lifted were cellular phones, beepers and phone batteries. Ms. Favoloro noted the position paid minimum wage plus commission and that Claimant's

employability would not be affected by his felony convictions. Wages ranged between $1,200 and $2,400 per month. (Tr. 82-84). Mr. Kramberg, however, opined this position was not appropriate since Claimant does not possess sales experience. (Tr. 127). I do not find Mr. Kramberg's opinion very persuasive with respect to this position, as the potential employer provides job training. Therefore, Claimant's lack of sales experience will not preclude Claimant from being considered. Consequently, I find this position to be within Claimant's physical and functional capabilities and thus, it constitutes suitable alternate employment.

The sales position at Circuit City also provided job training and did not require employees to lift more than 20 pounds. The hourly wage rate is $7.25 per hour, or on the basis of commission, whichever is greater. Additionally, employees can choose to work four, six, eight or ten hour shifts. Finally, Claimant's felony convictions would not affect his employability. (EX-8, p. 2; Tr. 84-85). Mr. Kramberg, however, opined this position would not be appropriate because Claimant possesses no sales experience, may not pass a background check or employment test and the duties may exceed his physical capabilities. Once again, I do not find Mr. Kramberg's opinion particularly persuasive, as Circuit City provides job training for their employees and therefore, Claimant's lack of sales experience would not preclude him from being considered for the job. Additionally, Mr. Kramberg claimed that Claimant may not pass a background check or employment test, but failed to inquire whether Claimant's criminal background would actually preclude him from securing employment with Circuit City. Furthermore, Mr. Kramberg did not know the content of the employment test except that "it is a personnel screening type of exam... the individual I spoke to... didn't give me any firsthand information about it." (Tr. 140). In light of the foregoing, I find Claimant to be physically and functionally capable of performing the duties of the sales position at Circuit City. Consequently, I conclude that this position constitutes suitable alternate employment.

Finally, the sales position at Conn's Appliances also provides job training. The physical requirements of the job involve alternate sitting, standing and walking, with no lifting over 20 pounds. Claimant's convictions would not affect his employability. Ms. Favoloro estimated the monthly wage earning capacity to be $1,750.00 plus commission. (Tr. 86). Mr. Kramberg rejected this position as suitable for the same reasons he found the sales position at Circuit City inappropriate. For the same reasons explicated hereinabove, I do not find Mr. Kramberg's opinion with respect to this position persuasive. Consequently, I find Claimant to be physically and functionally capable of performing the duties

of the sales position at Conn's. Accordingly, I conclude this position constitutes suitable alternate employment.

Based on the foregoing, I find that the positions at Centennial Wireless, Circuit City and Conn's Appliances constitute suitable alternative employment. I will further consider the additional positions identified for purposes of determining Claimant's post-injury wage earning capacity.

A final labor market survey was conducted on August 4, 1999. In assessing Claimant's employability at this time, Ms. Favoloro considered the FCE results concluding Claimant was capable of light duty work, as well as a letter from Dr. Beaudry concurring with the FCE. (EX-8, p. 1). Five positions in Orange, Texas were found which Ms. Favoloro opined fell within Claimant's educational and physical skills and capabilities: meter reader; sales associate at Circuit City; retail sales at Sears; sales/customer service position at K.B. Blake Imports; and production worker at Helena Labs. (EX-8, pp. 1-2).

The meter reader position involved walking, occasional bending and holding a 10-pound computer. Employees are required to perform one route per day in eight hours. Ms. Favoloro noted that most routes "are finished before lunch." Training is provided, during which trainees are paid $7.00 per hour. Following training, employees earn $9.00 per hour for the first three months of employment and $10.00 per hour thereafter. (EX-8, p. 1; Tr. 89-90). Mr. Kramberg opined this position was inappropriate primarily because the walking requirements would exceed Claimant's capabilities. I agree with Mr. Kramberg that the physical requirements of this position exceed Claimant's capabilities, as he testified he experiences weakness in his legs if he stands for periods longer than 15-20 minutes. Additionally, Dr. Beaudry did not approve of this position due to the physical requirements. (CX-3, p. 46). He noted that Claimant can alternate standing and walking for six hours of an eight hour day. Although Ms. Favoloro noted that most employees finish a route before lunch, the possibility that Claimant may have to stand and/or walk for an entire eight hour shift makes this position inappropriate and unsuitable for him. Thus, I find that the meter reader position does not constitute suitable alternate employment.

The sales position at Sears was re-included in this labor market survey. For the same reasons noted hereinabove, I find this position does not constitute suitable alternate employment.

The sales position at Circuit City was also re-included in this labor market survey. For the same reasons explicated

hereinabove, I find this position constitutes suitable alternate employment.

The door sales position with K.B. Blake Imports was classified as sedentary and paid $300-$400 per week. The physical duties included alternate sitting, standing and walking, with maximum lifting requirements of 20 pounds. Employees must also have the ability to get in and out of a car. No experience is necessary, as job training is provided. (EX-8, p. 2). Mr. Kramberg rejected this position because of "the tenuous pay," "the amount of walking that would be involved," and "the ability to deal with the public." (Tr. 134). I agree with Mr. Kramberg and believe that as a door to door salesman, the physical requirements which are not otherwise specifically proportionalized in time for each postural activity, in particular the walking and standing requirements, would exceed Claimant's physical restrictions as set forth by Dr. Beaudry. Thus, I find this position does not constitute suitable alternate employment.

Finally, the lab technician position at Helena Labs paid $6.65 per hour and provided job training. Lifting requirements did not exceed 20 pounds. Ms. Favoloro noted that employees package materials such as diagnostic laboratory equipment and supplies and are allowed to stand and walk during breaks and lunch. (EX-8, p. 2; Tr. 90). Mr. Kramberg opined this position was inappropriate because Claimant would not pass a driver's license check and the duties exceeded his capabilities. Upon review of this position, I do not find that the duties exceeded his capabilities, but rather, that the physical and functional requirements were not specified by Ms. Favoloro. She failed to denote whether Claimant would have to stand or sit while packaging equipment and the hours per shift he would be required to work in order to determine whether those requirements fell within Dr. Beaudry's restrictions. The impression created is that the job is primarily conducted in a seated position since standing and walking are allowed during breaks and lunch. If so, Claimant would clearly exceed the two hours of sitting permitted in a work day. In failing to address these specified requirements, I find this position does not constitute suitable alternate employment.

It should be noted that the positions which I found to constitute suitable alternate employment are all located in Beaumont, Texas. The sales position at Circuit City was available at locations in Beaumont and Orange, Texas. In light of the fact that Beaumont, Texas is approximately 23 miles from Claimant's place of residence (Orange, Texas), I find that the locations of these positions are within reasonable driving distance for a job commute and further support my finding that they constitute

suitable alternate employment for Claimant.

It should be noted that Claimant contends that his criminal history precludes certain jobs from being realistically available. Furthermore, Mr. Kramberg rejects all identified positions as unsuitable based on Claimant's criminal record. Claimant relies on Hairston v. Todd Shipyards Corp., 849 F.2d 1194 (9th Cir. 1988), in which the Ninth Circuit held that a claimant's criminal record, in existence at the time of the work injury, can prevent a potential job from being "realistically available" to the claimant, as the claimant could do nothing to overcome the disqualifying effect of his criminal record. Hairston, 849 F.2d at 1196; see also Piunti, supra. Claimant also points out that in Livingston v. Jacksonville Shipyards, Inc., 32 BRBS 123 (1998), the Board distinguished between "criminal" impediments which pre-existed a claimant's on-the-job injury and those which occurred after the claimant was injured, but before the employer established suitable alternate employment.

Employer/Carrier, on the other hand, point out that in Rivera v. United Masonry, Inc., 948 F.2d 774 (D.C. Cir. 1991), the District of Columbia Circuit held that while some aspects of an employee's background must be considered to determine the availability of suitable alternate employment, a claimant's status as an undocumented worker is not a relevant factor as it has no bearing on the claimant's ability to work. The Court agreed with the Board's reasoning that a claimant's status should not enable him to obtain a benefit available to legal injured workers with similar educational and vocational background. Id. Finally, Employer/Carrier distinguished Hairston by stating that no legal impediment exists in preventing Claimant from obtaining the positions, with the exception of the security guard positions, identified by Ms. Favoloro.

I agree with Employer/Carrier's argument and find that Claimant's pre-existing criminal background does not create a legal impediment which totally prevents him from obtaining any work. To the contrary, Ms. Favoloro testified that she asked each potential employer whether Claimant's felony conviction would affect his employability and was informed each time that it would not. With the exception of the security guard positions, which were eliminated because applicants had to possess "a clean police record," I find that Claimant's criminal record which was in existence at the time of his work injury, does not prevent a potential job from being "realistically available." I also find Mr. Kramberg's opinion unpersuasive and Claimant's argument unmeritorious. Accordingly, Claimant is not entitled to a finding of permanent total disability since suitable alternate employment

was established by Employer/Carrier.

D. Diligent Search and Willingness to Work

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates he diligently tried and was unable to secure employment. Hairston v. Todd Pacific Shipyards Corp., supra; Fox v. West State, Inc., 31 BRBS 118 (1997); Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988).

The claimant must establish that he reasonably and diligently attempted to secure some type of suitable alternative employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. Turner, supra; see also Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991). A claimant's testimony that he could perform certain jobs, but that his efforts to obtain one have been futile, does not meet employer's burden of establishing suitable alternative employment. Rieche v. Tracor Marine, 16 BRBS 272, 274 (1984). If a claimant demonstrates he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal, supra. Finally, the claimant must reasonably cooperate with the employer's rehabilitation specialist and submit to rehabilitation evaluations. Vogle v. Sealand Terminal, 17 BRBS 126, 128 (1985).

In the present case, I find Claimant has not been diligent or reasonable in his attempts to return to work.

Claimant testified that he applied for positions at Kinsel Auto Mall in 1998. (Tr. 47). In 1999, he applied for the following positions: Patriot Security (guard); Delta Security (guard); Harmon Chevrolet (delivery driver); Diamond Shamrock Gas Station (attendant); Car Care Auto Parts (delivery driver); Hi-Lo Auto Parts (delivery driver); Auto Zone (delivery driver); A-1 Transport (wrecker driver); and Gilbeaux's Towing (wrecker driver).[7] (Tr. 47-50). He claimed that none of the potential

[7] Ms. Favoloro noted in the August 4, 1999 labor market survey that Patriot Security and Delta Security were the only two employers she had provided to Claimant at which he applied. Ms. Favoloro also noted that she contacted the additional employers that Claimant sought employment from on his own in order to determine if he was physically and functionally capable of performing the duties of the job. She was unclear of the position for which Claimant was applying at Harmon Chevrolet.

employers called him for an interview, nor hired him. Id. He also testified that he recently checked for job availability at Reliable Cleaners (driver) and Triangle Chevrolet (delivery driver). (Tr. 51).

Ms. Favoloro, on the other hand, testified that about three weeks after conducting the August 21, 1998 and October 27, 1998 labor market surveys, she re-contacted the potential employers to verify that Claimant applied for employment. (Tr. 94). She was informed that Claimant had not applied for any of the jobs listed in those labor market surveys. Id. At that point, Ms. Favoloro did not believe Claimant was interested in her services. (Tr. 95).

Based on the evidence of record, I find that Claimant has not engaged in a diligent and reasonable search for alternate employment. Ms. Favoloro provided available job positions in August and October 1998 which were within Claimant's physical and functional capabilities, but he did not attempt to obtain any of the positions. Although Claimant did seek employment opportunities in 1999 at various other places, the majority of the positions sought were for specific jobs as delivery drivers; he did not apply for any of the positions, except the security guard positions, identified by Ms. Favoloro which were within his physical and functional capabilities. Mr. Kramberg opined Claimant would have difficulty in passing a driver's license check, in light of his felony DWI and three misdemeanor DWIs. (Tr. 135). I agree with Mr. Kramberg's opinion and find the delivery driver positions inappropriate. Furthermore, Dr. Beaudry opined that Claimant should not engage in driving or handling of heavy equipment, particularly where it might pose a threat of harm to Claimant or others. (CX-3, p. 28). Additionally, each of the additional positions for which Claimant applied clearly exceed his physical and functional restrictions, i.e., the lifting requirements. Thus, I find Claimant's attempts to seek employment as a delivery driver do not show a diligent or reasonable attempt to find gainful employment.

As noted hereinabove, Ms. Favoloro identified certain positions in her labor market surveys which were appropriate within Claimant's work restrictions as set forth by Drs. Beaudry and Haig. Since Claimant failed to diligently seek those jobs, or similar

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The Diamond Shamrock attendant and Autozone attendant required lifting up to 50 pounds. The Car Care delivery driver was required to lift up to 40 pounds. Gilbeaux's Towing required wrecker drivers to crawl under cars and lift tires, bumpers, etc. Ms. Favoloro was unable to contact Hi-Lo Auto Parts and A-1 Transports. (EX-8, pp. 2-3).

jobs, identified by Ms. Favoloro, I find Claimant has not presented evidence that he engaged in a diligent search for suitable alternative employment, but rather, made only minimal efforts to locate employment opportunities as a delivery driver, a position for which he would most likely not be considered, given his DWI record. Accordingly, since Claimant has failed to prove that he engaged in a diligent search for suitable alternate employment, I find Claimant is entitled to permanent partial disability compensation benefits from October 28, 1998 and continuing through present.

E. Average Weekly Wage

After the hearing, the parties submitted a supplemental stipulation agreeing that Claimant's average weekly wage at the time of injury was $425.00. (JX-2). Thus, I find Claimant's average weekly wage to be $425.00, which will be applied to his disability compensation benefits, as explicated hereinbelow.

June 2, 1997 - August 17, 1998

As noted hereinabove, Claimant worked modified light duty until he began treating with Dr. Beaudry on June 2, 1997, at which time, his status became temporarily totally disabled. Claimant remained temporarily totally disabled from June 2, 1997 through August 17, 1998, the date suitable alternate employment was established by Employer/Carrier. Thus, Claimant is entitled to the corresponding compensation rate of $283.35 per week, based on his average weekly wage of $425.00 ($425.00 x 66⅔% = $283.35) during this time period.

August 18, 1998 - September 21, 1998

Thereafter, because suitable alternative employment was established within Claimant's physical capabilities, even though he had not yet reached maximum medical improvement, his disability status becomes temporary partial and entitles him to disability compensation benefits based on the difference between his average weekly wage and his post-injury wage earning capacity. See Bryant, supra at 297.

Based on the four positions found to constitute suitable alternative employment,[8] I find that Claimant's post-injury wage

[8] The service advisor position with Kinsel Auto Mall; the sales position with Centennial Wireless; the sales position at Circuit City; and the sales position at Conn's Appliances.

earning capacity to be $358.08. This figure is based on the average ($461.54 + $276.92 + $403.85 + $290.00 = $1,432.31 ÷ 4 = $358.08) of the average weekly wages of the suitable alternative positions, as determined below.[9]

Thus, Claimant is entitled to temporary partial disability compensation benefits from August 18, 1998 through September 21, 1998, the date he reached maximum medical improvement, for a weekly compensation rate of $44.62 ($425.00 - $358.08 = $66.92 x 66⅔% = $44.62), which is based on the difference between his average weekly wage and his post-injury wage earning capacity.

September 22, 1998 - present

Thereafter, Claimant reached maximum medical improvement which changed his status to permanent partial and thus entitles him to disability compensation benefits based on the difference between his average weekly wage and his post-injury wage earning capacity.

As calculated hereinabove, I find that Claimant's post-injury wage earning capacity to be $358.08. Thus, Claimant is entitled to permanent partial disability compensation benefits from September 22, 1998 and continuing through present, for a weekly compensation rate of $44.62 ($425.00 - $358.08 = $66.92 x 66⅔% = $44.62), based on the difference between his average weekly wage and his post-injury wage earning capacity.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due,

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[9] Ms. Favoloro testified that the service advisor earns between $2,000 and $3,000 per month; the Centennial Wireless position pays between $1,200 and $2,400 per month; the Circuit City position pays $7.25 per hour; and the Conn's Appliances position pays about $1,750 per month plus commission. In the absence of any evidence supporting a finding that Claimant would make more than the minimum estimated salaries and an estimate of the commission pay he could earn at Conn's, I calculated Claimant's average weekly wage by multiplying each monthly salary by 12 months and dividing by 52 weeks: $2,000 x 12 = $24,000 ÷ 52 = $461.54 (service advisor); $1,200 x 12 = $14,400 ÷ 52 = $276.92 (Centennial Wireless); and $1,750 x 12 = $21,000 ÷ 52 = $403.85 (Conn's). I determined the average weekly wage of the Circuit City position to be $290.00 ($7.25 per hour x 40 hours per week = $290.00).

or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer has paid Claimant disability compensation from June 2, 1997 through October 4, 1998. In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[10] If Employer controverts Claimant's right to compensation, Employer had an additional fourteen days to file with the deputy commissioner a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n.3 (1981). In this matter, Employer/Carrier did not file a notice of controversion.

Since compensation benefits became due on June 2, 1997, after the period Claimant worked modified work and Employer/Carrier began paying such benefits on June 2, 1997, no penalties attach.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

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[10] Section 6(a) is not applicable since Claimant suffered his disability for a period of more than fourteen days.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from June 2, 1997 to August 17, 1998, based on Claimant's average weekly wage of $425.00, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for temporary partial disability from August 18, 1998 through September 21, 1998, based on the difference between Claimant’s average weekly wage of $425.00 and his reduced weekly earning capacity of $358.08 in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from September 22, 1998 and continuing through present based on the difference between Claimant's average weekly wage of $425.00 and his reduced weekly earning capacity of $358.08 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's April 14, 1997 work injury, pursuant to the provisions of Section 7 of the Act.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 29th day of February, 2000, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge